90-75

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

REUBEN J. BARTON; WILLIAM BEE; CARL D. CAIN; JAMES E. DAVIS; ULYSSES G. DEAN; CHARLES E. EVERETT; JOHN A. FLANAGAN; FRANK FOMINKO; MICHAEL L. FRAZIER; ROBERT H. FRAZIER; WOODY D. HAMRICK; CHARLES E. KNICELEY; MARK E. LABENNE; CHARLES G. LAFFERTY; MARK LANGBEIN; JAMES E. LANTZ; KENNETH L. MATHENEY; WILLIAM L. MAY; FREDERICK MCCARTNEY; HOWARD B. MITCHELL; JAMES E. NUTTER; MICHAEL A. NUTTER; JAMES R. PATTON; ISAAC S. PAUGH; STEPHEN B. RIEL; WILLIAM RINEHART; GLENN SHAW, JR.; LOWELL STOUT; DENNIS C. STUTLER; JOHN F. SWENSKIE; RONALD J. WEBB; LAWRENCE D. WILCOX,

Petitioners,

v.

THE CREASEY COMPANY OF CLARKSBURG, a West Virginia corporation, and FOX GROCERY CO., a West Virginia corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the petitioners' independent state statutory cause of action brought pursuant to the West Virginia Wage Payment and Collection Act (W.Va. Code Section 21-5-1, *et seq.*) is preempted by Section 301 of the National Labor Relations Act.

LIST OF ALL PARTIES TO THE PROCEEDINGS

All parties to this proceeding are listed in the caption of this case.

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IN THE

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OPINIONS BELOW

The Original opinion and Order of the United States Court of Appeals for the Fourth Circuit entered on the 13th day of March, 1990. (Appendix A). The Opinion and Order of the United States District Court for North-

ern West Virginia, entered on the 25th day of August, 1989. (Appendix B). The Order of the United States Court of Appeals for the Fourth Circuit on Petition for Rehearing with suggestion for Rehearing In Banc, entered on the 11th day of April, 1990. (Appendix C).

JURISDICTION

Jurisdiction is invoked pursuant to Rule 10 of the Rules of the United States Supreme Court, petitioning the court to review the judgment of the United States Court of Appeal for the Fourth Circuit entered on the 13th day of March, 1990. Thereafter a Petition for Rehearing with Suggestion for Rehearing in Banc was filed and the Court for the United States Court of Appeal for the Fourth Circuit denied said Petition for Rehearing with Suggestion for Rehearing in Banc, by order filed on the 11th day of April, 1990.

STATUTORY PROVISIONS INVOLVED

The West Virginia Wage Payment and Collection Act, West Virginia Code Section 21-5-1 *et seq.* (See Appendix D).

Section 301 of the National Labor Relations Act. (Set forth herein below):

Liabilities of and Restrictions on Labor and Management

29 U.S.C. Section 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioners Reuben J. Barton, et al, filed a complaint in the Circuit Court of Harrison County, West Virginia, on the 29th day of May, 1987. This complaint was brought pursuant to the provisions of the West Virginia Wage Payment and Collection Act, West Virginia Code, Section 21-5-1 to Section 21-5-16 as alleged in Paragraph 1 of said complaint. The complaint alleged two causes of action, one for the payment of unpaid vacation pay and the second cause of action for a breach of implied contract for the payment of severance pay.

The petitioners are all former employees of the respondent, The Creasey Company of Clarksburg, a West Virginia corporation. On or about the 8th day of July, 1985, respjondent, The Creasey Company of Clarksburg, merged with and into the respondent, Fox Grocery Company, which is also a West Virginia corporation. The petitioners were laid off and ultimately terminated from their employment with the respondent The Creasey Company of Clarksburg, during the first two to three weeks of July, 1985. The complaint is specific as to the claims made by each individual petitioners as set forth in Paragraph 7 of said complaint.

The respondents have not denied that all of the petitioners were former employees of the respondent, The Creasey Company of Clarksburg. The respondents have denied that any moneys are due to the petitioners either in the form of unpaid vacation pay or unpaid severance pay.

Thereafter, on July 1, 1987, the respondents filed a Petition for Removal and removed the case to the United States District Court for Northern West Virginia. The petitioners alleged that the civil action is founded on a claim or right arising under the provisions of a Collective Bargaining Agreement and interpretation thereof and is a civil action of which the United States District

Court has original jurisdiction under Section 301 of the National Labor Relations Act.

Thereafter, the respondents filed a Motion to Dismiss and Brief in Support thereof on October 7, 1987. The petitioners filed a Response to respondents' Motion to Dismiss and a Motion to Remand the matter back to the Circuit Court of Harrison County on October 22, 1987.

On August 25, 1989, Judge Robert E. Maxwell, of the United States District Court for Northern West Virginia, entered an Order granting the respondents' Motion to Dismiss the petitioners' complaint (Appendix B). The Court stated the issues involved in the beginning of its Order Memorandum as follows:

> It is clear in reviewing the arguments of counsel that the Court must primarily determine whether this action is preempted by Section 301 of the National Labor Relations Act (NLRA) or whether plaintiffs have presented a state law claim independent of a collection bargaining agreement for Section 301 preemption purposes. After careful consideration of the matters presented by the parties and the applicable law, the Court concludes that the claims are preempted by Section 301 of the NLRA."

By granting the respondents' Motion to Dismiss the District Court failed to grant the petitioners' Motion to Remand.

The Order of the District Court for the Northern District of West Virginia was appealed by the petitioner to the United States Court of Appeals for the Fourth Circuit.

The United States Court of Appeals in an unpublished opinion decieded on March 13, 1990, affirmed the decision of the District Court. (Appendix A).

Petitioners filed a Petition for Rehearing with Suggestion for Rehearing in Banc which was denied by the United States Court of Appeal for the Fourth Circuit which was filed on April 11, 1990. (Appendix C).

This Petition for Writ of Certiorari is for review of the unpublished opinion/order of the Fourth Circuit Court of Appeals decided March 13, 1990, and upon the Court's denial of the petitioners' Petition for Rehearing with Suggestion for Rehearing in Banc filed on April 11, 1990.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN THIS CASE IS IN CONFLICT WITH DECISIONS OF THE WEST VIRGINIA SUPREME COURT OF APPEALS.

A. The Complaint Filed Asserts a State Cause of Action Pursuant to the Provisions of the West Virginia Wage Payment and Collection Act, West Virginia Code Section 21-5-1 to Section 21-6-16 and Is Not Preempted by Section 301 of the NLRA.

The complaint filed herein was brought pursuant to the provisions of the West Virginia Wage Payment and Collection Act; West Virginia Code, Section 21-5-1 to Section 21-5-16. In addition, the relief requested by several paragraphs of the complaint are provisions for relief provided for in the Wage Payment and Collection Act. The final relief requested for by the petitioners is relief offered by the Wage Payment and Collection Act.

Any mention of the collective bargaining agreement throughout the complaint is merely incident to the primary complaint which is that the petitioners have not been *timely paid.* It is obvious that before it can be determined what wages an employee is due, an oral, written or implied agreement to pay said wages must be established. However, the collective bargaining agreement is not the primary subject of the dispute.

The West Virginia Wage Payment and Collection Act defines wages to include fringe benefits (See West Virginia Code Section 21-5-1(c)) (Appendix D) and fringe benefits include regular vacation and graduated vacation (See West Virgina Code Section 21-5-1(1)). (Appendix D).

Simply because an individual is a member to a collective bargaining agreement does not mean that he or she should be denied the statutory benefit of the West Virginia Wage Payment and Collection Act. Certainly this was not the intention of the state legislature. Section 21-5-10 of the Act (Appendix D), specifically provides that no provision of the Act may in any way be contravened or set aside by private agreement. A collective bargaining agreement is nothing more than a private agreement.

The interest of the Wage Payment and collection is certainly not to relegate all West Virginia employees who happen to be covered by a collective bargaining agreement to a lesser status. This result would be the greatest of ironies.

The purpose of the West Virginia Wage Payment and Collection Act is remedial in nature designed to protect working people and assist them in the collection of compensation wrongly withheld *Mullins v. Venable*, 297 S.E.2d 866, WV (1982). Because it is remedial legislation it should be liberally construed to include coverage of *all* working people.

1. ***The West Virginia Wage Payment and Collection Act provides benefits and remedies not available under the collective bargaining agreement.***

The benefits of the West Virginia Wage Payment and Collection Act are very real and provide the petitioners with rights they would not have under their collective bargaining agreement. The primary benefits are as follows:

a. *A longer statute of limitations to bring a cause of action which is five year*, Jones v. Tri-County Growers, *366 S.E.2d 726 (W.V. 1988 Syl. Pt. 2)*.

This is significant in that most grievances under collective bargaining agreement must be filed within days. In addition, Section 301 suits pursuant to the NLRA must

be filed within six (6) months, *DesCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983).

This additional time period is exremely important and helpful to workers who may generally be ignorant of their rights or who are often intimidated by their employees.

b. *Collection of attorney fees.*

The provisions of the Wage Payment and Collection Act, West Virginia Code Section 21-5-12 provide that the Court may assess the costs of the action "including reasonable attorney fees" against the employer defendant. This is important to employees whose unpaid benefits are not significant to warrant an attorney getting involved unless there is the opportunity for his fees to be paid by the defendant employer if he is successful.

c. *Liquidated damages.*

West Virginia Code Section 21-5-4(e) provides for liquidated damages in the amount of thirty (30) days' wages after the employer fails to make timely payment.

This provision is a legitimate deterrent to employers who fail to timely pay wages knowing that it is often economically impractical for an employee to pursue litigation. This is a deterrent that should exist against all employers, union or non-union.

All of the above are benefits the petitioners have under the West Virginia Wage Payment and Collection Act that they otherwise would not have, even under their collective bargaining agreement. A Court should not deny them of their rights granted by the West Virginia Legislature.

In addition, there may be a void when an employee, covered by a collective bargaining agreement, is discharged or terminated. The employee's discharge or termination may leave him or hear without any rights under

the agreement and their only recourse would be in a state court pursuant to state law.

In short, the Fourth Circuit's opinion relegates all West Virginia employees who happen to be covered by a collective bargaining agreement to a lesser status and denies them of certain rights and remedies as stated herein. A collective bargaining agreement should not be used as a means to take away certain statutory rights from an employee. Collective bargaining agreements are rights negotiated and bargained for in addition to statutory rights created by the West Virginia Legislature for all citizens.

2. *The West Virginia Supreme Court has taken great efforts to ensure that* all *West Virginia workers will enjoy their statutory rights, regardless of a collective bargaining agreement, as indicated by the following decisions.*

In *Davis v. Kitt Energy*, 365 S.E.2d 82 (W.Va. 1987), the West Virginia Supreme Court held in Syllabus Point 4 that "a miner against whom an arbitration decision has been rendered under a collective bargaining involving a safety claim is not foreclosed from pursuing a discrimination remedy under West Virginia Code Section 22A-1A-20," a West Virginia statute.

The Court in the *Davis v. Kitt* decision preserved an individual's statutory rights even after he had already exercised his rights under a collective bargaining agreement and was unsuccessful.

The West Virginia Supreme Court in its decision relied upon the United States Supreme Court decision in *Alexander v. Gardner-Denver*, 415 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984), See *Davis v. Kitt*, 365 S.E.2d 82 at Page 89.

The *Davis v. Kitt* decision is quoted as follows from Page 89:

> More importantly, the Court spoke of statutory rights that were absolute and "represent[ed] a congressional command that each employee be free from discriminatory practices." It observed that the "rights conferred [by statute] can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose. . . ." 415 U.S. at 51, 95 S.Ct. at 1021, 39 L.Ed.2d at 160

The West Virginia Supreme Court addressed this issue again at length in *Lowe v. Imperial Colliery Co.*, 377 S.E.2d 652 (W.Va. 1988). In Syllabus Part 5 the Court held that:

> The mere fact that W.Va. Code, 21-5-4 (Wage Payment and Collection Act) relates to matters which may be the subject of a collective bargaining does not mean that the terms of this statute are preempted by Section 301 of the NLRA." 29 U.S.C. Section 185 (1947).

West Virginia Courts have made it clear that all employees must enjoy their statutory rights and that these rights are in addition to any rights an employee may have pursuant to their collective bargaining agreement or under Section 301 of the NLRA.

II. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN THIS CASE IS IN CONFLICT WITH ITS OWN PRIOR DECISION IN *GEORGETOWN STEEL* AND THE DECISION ON THE SAME MATTER RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *GULDEN*.

A. Federal Law Also Requires That *All* Employees Must Enjoy Their Statutory Rights and They Are Not Precluded by Collective Bargaining Agreements.

The U. S. Supreme Court most recently addressed this matter in *Lingle v. Norge*, 486 U.S. ——, 100 L.Ed.2d

410, 108 S.Ct. 1877 (1988). The Court's decision in *Lingle v. Norge* states that:

> . . . There is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreement.

The Court further noted that:

> Although our comments in *Bueil*, construing the scope of Railway Labor Act preemption, referred to independent federal statutory rights, we subsequently rejected a claim that federal labor law preempted a state statute providing a one-time severance benefit to employees in the event of a plant closing. In *Fort Halifax Packing C. v. Coyne*, 482 U.S. ——, —— (1987), we emphasized that "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." We specifically held that the Main law in questions was not pre-empted by the NLRA, "since its establishment of a minimum labor standard does not impermissible intrude upon the collective-bargaining process." Id., at ——.

Footnote twelve (12) in the Court's opinion is particularly on point when it states that:

> A collective bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. See *Baldracchi v. Prott & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102, 106 (CA2 1987). Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise pre-empted, would stand. Thus as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not

> turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted. As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 211, "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is pre-empted by Section 301. . . ."

As is the case here, the petitioners' claim is brought pursuant to the West Virginia Wage Payment and Collection Act. Of course the Court is going to have to look to some contract, either oral or written, to determine the amount of damages the petitioners are due; however, this does not involve an interpretation of the agreement, but simply an application of the agreement. The Court should be extremely hesitant and cautious to take away the rights of West Virginia workers granted to them by their state legislature.

On Page 5 of the Fourth Circuit's opinion (See Appendix A attached hereto), the Court cited and relied upon the doctrine of *Lingle v. Norge Div. of Magic Chef., Inc.* and stated that "application of state law is preempted by Section 301 . . . if such application requires the interpretation of a collective bargaining agreement.

The United States Court of Appeals for the Ninth Circuit decided *Gulden v. Crown Zellerback Corp.*, 890 F.2d 195 (9th Cir. 1989) on November 24, 1989.

In *Gulden* the defendant/employer argued that plaintiff's state law cause of action was preempted because a determination of plaintiff's damages required reference to the collective bargaining agreement. Relying on *Lingle v. Norge Div. of Magic Chef., Inc.*, 486 U.S. 399 (U.S. 1988), the Ninth Circuit held that calculation of damages from the labor contract did not require pre-emption. *Gulden*, at Page 199.

This case is analogous in that any time an employee makes a claim for lost or unpaid wages and benefits, the collective bargaining agreement must be reviewed to determine what those wages and benefits are. If the complete preemption doctrine is followed to its logical extreme, employees will never be permitted to bring a cause of action against their employer pursuant to independent statutory causes of action which involve claims for damages which are primarily for lost wages and benefits.

It is important to note that the Ninth Circuit, as authority for its opinion, cited the same footnote (Footnote 12) in *Lingle v. Norge* which was cited by the petitioner herein in support of its position.

Counsel for petitioners is of the opinion that the per curiam decision of March 13, 1990, is in conflict with the Ninth Circuit's opinion in *Gulden* in regard to its interpretation of *Lingle v. Norge*.

The United States Supreme Court in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) involved an individual's claim filed under the Fair Labor Standards Act (FLSA) which deals with among other things, wages, the heart of collective bargaining agreement. The Court in *Barrentine* held:

> Because Congress intended to give individual employees the right to bring the minimum wage claims under the FLSA in Court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in a arbitrarial form, we hold that petitioners' claim is not barred by the prior submission of their grievances to the contractual dispute-resolution procedure. *Barrentime* at 745.

If employees are permitted to file claims concerning wages under the FLSA they certainly should be permitted to file claims pursuant to the West Virginia Wage Payment and Collection Act.

1. *A statutory cause of action is independent and separate from a collective bargaining agreement.*

An employees' statutory cause of action is an *independent* state cause of action independent from the collective bargaining agreement. The mere fact that the Court may have to refer to a collective bargaining agreement to determine wages does not convert the action to a federal issue. Federal Courts have consistently held in employment issues involving discrimination, mine, health and safety, and wage and hour cases that where specific state statutes create a private statutory cause of action, public policy requires that a collective bargaining agreement cannot deprive an individual of an independent statutory cause of action.

2. *The petitioners' complaint states a state cause of action and not a federal cause of action.*

As this Court is well aware, Federal Courts are Courts of limited jurisdiction. Initially, the Court must look to its subject matter jurisdiction over the matter. It is well settled that a federal question must appear on the face of plaintiffs' well-pleaded complaint. *Cook v. Georgetown Steel Corp.*, 770 F.2d 1272 (4th Cir. 1982); *City National Bank v. Edmisten*, 681 F.2d 942 (4th Cir. 1982); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974); *Gulley v. First National Bank*, 299 U.S. 109, 112-113 (1936); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908). Defendants' assertion of an issue of federal law in the pleadings or in the petition for removal does not create a federal question, *Phillips Petroleum Co. v. Texaco, Inc., supra*. The "well-pleaded complaint" rule applies to removal cases as well. *Franchise Tax Board v. Construction Laborers Vacation Trust, supra*.

When, as in the matter before the Court, plaintiff presents a state law claim and defendant counters by argu-

ing that federal law preempts the state law on which plaintiff relies, the federal claim appears by way of defense, *Cf. Champion International Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984). However, the assertion of a defense that federal law has preempted that state law upon which plaintiff relies does not itself create a federal question for the purposes of the removal statute. *Trent Realty Assoc. v. First Savings and Loan Ass'n of Philadelphia*, 657 F.2d 29, 35 (3rd Cir. 1981); *Illinois v. Kerr McGee Chemical Corp.*, 667 F.2d 571 (7th Cir. 1982); *First National Bank of Aberdeen v. Aberdeen Nat'l Bank*, 627 F.2d 843 (8th Cir. 1980); *Nolore v. San Diego Federal Savings and Loan Ass'n*, 663 F.2d 841 (9th Cir. 1981). A plaintiff is the "master of the complaint." *See 13 C. Wright A. Miller & E. Cooper, Federal Practice and Procedure*, Section 3566, at 438 (1975). Justice Holmes wrote in 1913:

> The party who brings a suit is master to decide what law he will rely upon and therefore does not determine whether he will bring a "suit arising under" the patent or other law of the United States by his declaration or bill.

The *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

3. *The Fourth Circuit has specifically addressed this issue in* Cook v. Georgetown Steel Corp., *770 F.2d 1272 (4th Cir. 1982).*

In *Cook v. Georgetown Steel Corp., supra*, the Court of Appeals for the Fourth Circuit addressed a jurisdictionally similar matter as that presently before the Court. There ten individual plaintiffs who worked at defendant Georgetown Steel mill under a collective bargaining agreement were permanently or otherwise laid off. Georgetown Steel withheld amounts equaling vacation payments from plaintiffs' final paychecks, claiming that these amounts were not yet earned. Plaintiffs filed indi-

vidual actions in State Court seeking payment of the withheld vacation amounts and civil penalties under the Court Carolina wage claim statute. Thereafter, the parties settled by agreeing that plaintiffs would be paid the amounts withheld provided, however, that in the future, laid off employees would have to reimburse the company for unearned vacation. Georgetown Steel did not immediately pay the disputed amount. Instead it paid the disputed amounts to only four of the laid off employees who agreed to sign releases. Thereupon, Georgetown Steel removed the state suit to Federal Court where a bench trial was conducted.

On appeal, Chief Judge Harrison L. Winter, writing for the Court, *sua sponte*, addressed the lower Court's subject matter jurisdiction. After finding that plaintiffs' complaint did not allege any issue relating to the collective bargaining agreement and merely stated a state law claim for unpaid wages and penalties, the Court addressed the "well-pleaded complaint" rule. The Court noted the recent reaffirming of that rule by the United States Supreme Court in *Franchise Tax Board v. Construction Laborers Vacation Trust*, *supra*. The Court reasoned that although the matter before it raised substantial issue under both state and federal law, "if a well-pleaded complaint does not invoke federal law, jurisdiction does not exist even in the stronger case where the only real issue in the case is a federal one." *Georgetown Steel*, *supra*, at Page 1276.

Most notable, the Court, in *Georgetown Steel*, in Footnote 4, Page 1276, citing the *Franchise Board* case states:

> The (well-pleaded complaint) rule however, may produce awkward results, especially in cases in which neither the obligation created by state law nor the defendant's factual failure to comply are in dispute, and both parties admit that the only question for decision is raised by a federal preemption defense. Nevertheless, it has been correctly understood to ap-

> ply in such situations, Id. at 12, 103 S.Ct. at 2848. (emphasis added).

The Appeals Court then vacated the judgment of the District Court and remanded the case back with instruction to remand to State Court.

Here, the petitioners' claim are cast entirely in state law and nothing substantial is being sought under the collective bargaining agreement herein, even though the collective bargaining agreement does establish that the plaintiffs are entitled to certain wages.

All of the legal arguments set forth by the District Court and the Fourth Circuit are arguments based upon the factual premise that a federal issues is involved. Petitioners assert for reasons already stated herein that a federal issues is not involved and therefore the Court's decision based upon that factual premise are not appropriate or applicable.

In addition, petitioners have an independent statutory state cause of action which they are entitled to have heard in State Court. An independent cause of action which gives them greater rights than they would have under a collective bargaining agreement. The existence of a collective bargaining agreement is merely incident to the primary state cause of action which is for the collection of wages.

CONCLUSION

For the reasons stated herein, petitioners request that this Court set aside the District Court's Order dismissing its complaint and the Fourth Circuit's ruling affirming that decision, and direct that the District Court remand this case to the Circuit Court of Harrison County, West Virginia, so the case may proceed on its merits.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2170

REUBEN J. BARTON; WILLIAM BEE; CARL D. CAIN; JAMES E. DAVIS; ULYSSES G. DEAN; CHARLES E. EVERETT; JOHN A. FLANAGAN; FRANK FOMINKO; MICHAEL L. FRAZIER; ROBERT H. FRAZIER; WOODY D. HAMRICK; CHARLES E. KNICELEY; MARK E. LABENNE; CHARLES G. LAFFERTY; MARK LANGBEIN; JAMES E. LANTZ; KENNETH L. MATHENEY; WILLIAM L. MAY; FREDERICK MCCARTNEY; HOWARD B. MITCHELL; JAMES E. NUTTER; MICHAEL A. NUTTER; JAMES R. PATTON; ISAAC S. PAUGH; STEPHEN B. RIEL; WILLIAM RINEHART; GLENN SHAW, JR.; LOWELL STOUT; DENNIS C. STUTLER; JOHN F. SWENSKIE; RONALD J. WEBB; LAWRENCE D. WILCOX,

Plaintiffs-Appellants,

versus

THE CREASEY COMPANY OF CLARKSBURG, a West Virginia corporation; FOX GROCERY COMPANY, a West Virginia corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg
Robert E. Maxwell, Chief District Judge—(CA-87-75-C)

Submitted: December 27, 1989 Decided: March 13, 1990

Before PHILLIPS, SPROUSE, and WILKINS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Michael John Aloi, MANCHIN, ALOI & CARRICK, Fairmont, West Virginia, for Appellants. Frederick F. Holroyd, II, HOLROYD, YOST & MERICAL, Charleston, West Virginia, for Appellees.

PER CURIAM:

Reuben J. Barton and other former employees of Creasey Company appeal the district court's dismissal of their action against Creasey Company and Fox Grocery Company for unpaid vacation and severance pay. The district court granted the appellees' petition to remove the action from state court based on the doctrine of complete preemption, holding that any claims the employees may have had under West Virginia statutory law were preempted by their union's collective bargaining agreement with Creasey Company. In a later order, the court denied appellants' motion to remand the case to state court and granted appellees' motion to dismiss on the ground that the action was time-barred. We now affirm the judgment of the district court.

I

In July 1985, the appellants were laid off, then terminated, from their employment with the Creasey Company of Clarksburg, West Virginia, shortly after Creasey's merger with the Fox Grocery Company. At the time of their termination, the appellants were covered by a 1983 collective bargaining agreement between Teamsters Local Union No. 789 and Creasey Company. That agreement contained a clause providing vacation pay to specified employees. It did not expressly provide severance

pay to non-management bargaining unit employees, although some management employees of Creasey were entitled to severance pay under separate agreements.

In May 1987, the appellants filed a complaint in the Circuit Court of Harrison County, West Virginia, seeking recovery of vacation and severance pay. Count 12 of the complaint alleged that Creasey Company and Fox Grocery Company "have failed and refused to provide fringe benefits for vacation pay as provided by the parties' Collective Bargaining Agreement . . . ." Counts 13 and 14 alleged that certain management employees received severance pay, providing the basis for the allegation in Count 15 that such action "created an implied contract to pay all employees severance pay . . . ," which contract, Count 16 alleged, the companies had breached.

The appellees successfully petitioned for removal to the United States District Court for the Northern District of West Virginia, arguing that the court had original jurisdiction of the action under § 301 of the National Labor Relations Act. Soon thereafter, the district court denied the appellants' motion to remand the case to state court and granted the appellees' motion to dismiss, concluding that the claims were time-barred.

This appeal followed.

II

The appellants' only claim of error regards the district court's finding of complete preemption and the resulting denial of their motion to remand. They have not challenged the district court's conclusion that, if § 301 of the NLRA governs this action, it was time-barred under the six-month statute of limitations applicable to suits for violations of collective bargaining agreements. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Rather, their specific argument is that their claims did not arise under § 301 because they have a cause of action for recovery of vaca-

tion and severance pay under the West Virginia Wage Payment and Collection Act, W. Va. Code §§ 21-5-1 to -18, that is independent of, and thus not preempted by, the collective bargaining agreement.

The West Virginia statute provides various procedures and remedies, such as liquidated damages, attorney's fees, and a generous statute of limitations, to facilitate an employee's collection of wrongfully withheld pay and wages. The statute does not, however, grant any entitlements to pay or wages, and the appellants have not contended that it does. Thus, despite their assertions that their claims arise wholly under the West Virginia statute, the appellants' complaint in state court shows that any substantive pay would require interpretation of the collective bargaining agreement. Under the doctrine of *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), those claims are therefore preempted: "[A]pplication of state law is preempted by § 301 . . . if such application requires the interpretation of a collective-bargaining agreement." *Id.* at 413.

The necessity of interpreting the collective bargaining agreement here is manifest. Count 12 of the complaint expressly invoked the collective bargaining agreements as the source of the claimed right to vacation pay, and it is precisely with respect to the interpretation of relevant provisions of the agreement that appellants and the Creasey and Fox companies join issue on the merits. Similarly, the existence of a collective bargaining agreement that comprehensively addresses issues of wage and pay preempts the implied contract claim for severance pay. Any such claim could not be assessed without examining the contractual relationship between the union and the employer, as embodied in the collective bargaining agreement. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

The district court therefore properly concluded that the application of state law to the claims for vacation

and severance pay was preempted by § 301. To the extent that the employees' claims invoked state law, the court correctly held that the "complete preemption" exception to the well-pleaded complaint rule supported federal jurisdiction in this case. *See Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425, 2430 (1987); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22-24 (1983).*

III

For the foregoing reasons, we affirm the district court's denial of the employees' motion to remand to state court. As the record supports the district court's conclusion, not directly challenged on appeal, that the employees' claims were time-barred by the six-month statute of limitations applicable to claims under § 301, we affirm the district court's dismissal on that ground. We dispense with oral argument because the facts and legal contentions are adequately developed in the materials before the court and argument would not aid in the decisional process.

AFFIRMED

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* At least with respect to the vacation pay claim, the employees' invocation of a right purportedly created by the collective bargaining agreement would also have supported original federal jurisdiction, and therefore removal, under the well-pleaded complaint rule: "When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option." *Caterpillar*, 107 S. Ct. at 2433 (emphasis in original).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Civil Action No. 87-0075-C

REUBEN J. BARTON, *et al.*,
Plaintiffs,

v.

THE CREASEY COMPANY OF CLARKSBURG,
a West Virginia Corp., and FOX GROCERY CO.,
a West Virginia Corp.,
Defendants.

ORDER

[Filed Aug. 25, 1989]

Originally instituted in the Circuit Court of Harrison County, West Virginia, this action was removed by the defendants on July 1, 1987, on the basis of federal question jurisdiction. Pending before the Court are defendants' Motion to Dismiss, filed October 7, 1987, and plaintiffs' Motion for Remand, filed on October 22, 1987. It is clear in reviewing the arguments of counsel that the Court must primarily determine whether this action is preempted by § 301 of the National Labor Relations Act (NLRA) or whether plaintiffs have presented a state law claim independent of a collective bargaining agreement for § 301 preemption purposes. After careful consideration of the matters presented by the parties and the applicable law, the Court concludes that the claims are preempted by § 301 of the NLRA.

Plaintiffs are former employees of defendant Creasey Company which on or about July 8, 1985, merged with defendant Fox Grocery. Shortly thereafter, the Creasey Company warehouse was closed and plaintiffs were termi-

nated. Plaintiffs allege that they are uncertain whether their employer was defendant Creasey Company or defendant Fox Grocery as of the date of their termination. Plaintiffs allege and defendants admit that pursuant to the terms of a Collective Bargaining Agreement entered into on November 24, 1983, by defendant Creasey Company and Teamster Local Union No. 789, on behalf of and as the authorized bargaining representative of the plaintiff employees, Creasey Company was required to provide certain wages and fringe benefits to its employees. Plaintiffs further allege and defendants admit that each of the individual plaintiffs worked in excess of one hundred twenty days in the year of 1985 to entitle them to full vacation pay. However, plaintiffs allege that since July 19, 1985, defendants have failed to refused to provide fringe benefits for vacation pay as provided by the Collective Bargaining Agreement in violation of the West Virginia Wage Payment and Collection Act. Defendants deny this allegation.

In addition to unpaid vacation benefits, plaintiffs allege that the defendants have created an implied contract to pay severance pay to all employees because defendants paid severance pay to all of its management employees upon their termination and have paid certain employees severance pay for time worked as union employees.

Defendants' motion to dismiss contends that the plaintiffs have not brought a complaint pursuant to the West Virginia Wage Payment and Collection Act, but are in actuality claiming a breach of the Collective Bargaining Agreement which triggers the preemptive force of § 301 of the LMRA. Defendants further contend that under the Collective Bargaining Agreement plaintiffs had an affirmative obligation to submit their claims to arbitration, which they failed to do. Moreover, defendants contend that in this instance an action for breach of a collective bargaining agreement pursuant to § 301 is time-barred because it was not commenced within the six-

month period of limitations for such actions. *DelCostello v. International Brohterhood of Teamsters*, 462 U.S. 151 (1983).

With regard to plaintiffs' claim of implied contract, defendants also contend that such a claim is preempted by the NLRA where a collective bargaining agreement is in existence covering the employees involved. *Maushund v. Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986).

In response to the motion to dismiss as it relates to unpaid vacation benefits, plaintiffs argue that this complaint was brought pursuant to the provisions of the West Virginia Wage Payment and Collection Act, *West Virginia Code* § 21-5-1 to § 21-5-16, and requests relief pursuant to the provisions of the West Virginia Wage Payment and Collection Act and that, therefore, removal of the complaint was improvident.

On June 29, 1988, the defendants filed a motion for leave to file additional case citation and argument, in which defendants argue that the then recently decided case of *Lingle v. Norge Division of Magic Chefs, Inc.*, 486 U.S. ——, 100 L.Ed.2d 410, 108 S. Ct. 1877 (1988), clearly denies the Court jurisdiction of cases such as this one which require interpretation of the Collective Bargaining Agreement. Plaintiffs filed a response to the additional case citation and argument of defendants in which plaintiffs assert that the *Lingle* decision supports plaintiffs' position that their claim is an independent statutory cause of action not preempted by federal labor law.

By Order entered February 21, 1989, the Court deferred making a ruling on the pending motions until providing counsel with an opportunity to express their views on the question of whether ERISA is applicable to the controversy evident in this civil action. *See Holland v. National Steel Corp.*, 791 F.2d 1132 (4th Cir. 1986).

On April 4, 1989, plaintiffs filed a memorandum on the applicability of ERISA.[1]

Plaintiffs have not addressed the motion to dismiss as it relates to the claim of implied contract for severance pay. Nevertheless, it is undisputed that these employees were members of Local 789 of the Teamsters, with whom the employer had a collective bargaining agreement. A claim for severance pay pursuant to an implied contract would unhesitatingly be preempted by the NLRA where a collective bargaining agreement is in existence covering the employees involved. *NLRB v. Allis Chalmbers Mfg.* 388 U.S. 175, 180 (1967). It is unquestionable that national labor policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *Maushund*, 795 F.2d at 590, n.1 (6th Cir. 1986). The employees under such circumstances are bound by the decisions made by the union during the bargaining process and are restrained from subsequently claiming entitlement to additional rights, privileges, wages, conditions, etc., such as the severance pay claimed by plaintiffs herein.

With regard to the issue of preemption of the unpaid vacation benefits, plaintiffs correctly argue that the presence of federal question jurisdiction is generally determined by the "well-pleaded complaint" rule. *Gully v. First National Bank*, 299 U.S. 109, 112-13 (1936); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908). Consequently, an action originally instituted in the state court can be properly removed on the basis of federal question jurisdiction "only when a federal question is presented on the face of the plaintiff's properly pleaded

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[1] While it is questionable that a benefit plan was in existence which would trigger ERISA preemption, *See, Fort Halifax Packing Co., Inc. v. Coune*, 96 L.Ed.2d 1 (1987), the Court need not reach this question in light of the determination that § 301 preemption is mandated.

complaint." *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425, 2429 (1987). It is now well established, however, that the doctrine of "complete preemption" serves as an exception to the well-pleaded complaint rule. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22-24 (1983). Notably, the complete preemption exception to the well-pleaded complaint rule "is applied primarily in cases raising claims preempted by § 301 of the LMRA." *Caterpillar*, 107 S.Ct. at 2430.

Section 301(a) of the LMRA, 29 U.S.C. § 185a, provides that:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

It has been established that Congress enacted § 301 with the intent that federal labor law doctrines would uniformly prevail over inconsistent state law. *Teamsters v. Lucas Flower Co.*, 369 U.S. 95 (1962). However, the Supreme Court has held that a state claim is preempted by § 301 "only if such application requires the interpretation of a collective-bargaining agreement." *Lingle*, 108 S. Ct. at 1885. If it is determined that the claimant has alleged a colorable state-law cause of action, the Court must determine whether the state claim is independent of the collective bargaining agreement and therefore not preempted. Thus, "the preemptive effect of § 301 . . . depends upon the elements of the purported state-law claim." *Childers v. The Chesapeake and Potomac Telephone Company of Virginia, et al.*, —— F.2d ——, 1989 WL 83163 (4th Cir. July 28, 1989).

It is clear from the admissions made in the defendant's answer that a colorable state cause of action under the West Virginia Wage Payment and Collection Act has been raised by the plaintiffs. The Court must now decide

whether this colorable state-law cause of action is independent of the Collective Bargaining Agreement.

Plaintiffs claim that the defendants have not timely paid accrued vacation benefits. "As a precondition to recovery, it is necessary for the plaintiffs first to prove entitlement to such pay." *Lowe v. Imperial Colliery Co.*, 377 S.E.2d 652, 657 (W. Va. 1988).

The elements of the state-law claim in the present case clearly distinguish it from *Lingle*. Here, in contrast to *Lingle*, the employees' claims are based on a provision in the Collective Bargaining Agreement which gave rise to the dispute between the defendants and former employees. *West Virginia Code* § 21-5-4 does not create entitlement to vacation pay; it provides for payment of wages, which include accrued fringe benefits, within a certain specified time upon termination of employment. Unlike the circumstances in *Lingle* and unlike those in *Fort Halifax*, West Virginia law did not create the vacation benefits in dispute. Rather, the employees' claims against Creasey and Fox are based on a provision for vacation benefits created by the Collective Bargaining Agreement. Thus, an interpretation of the Collective Bargaining Agreement is unavoidable.[2] Under such circumstances, *Lingle* teaches that the cause of action is preempted by federal labor law. It is accordingly

ORDERED that plaintiffs' Motion for Remand be, and hereby is, DENIED as this cause of action is preempted by § 301 of the LMRA.

Defendants support their motion to dismiss by arguing that the claims are time barred by the applicable statute

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[2] The Court is aware that the West Virginia Supreme Court of Appeals reaches an opposite conclusion in *Lowe*, but the Court believes that the determination herein is consistent with recent interpretations of *Lingle* by the U.S. Court of Appeals for the Fourth Circuit. *See, Briggs, et al. v. Heinz, U.S.A.*, No. 88-3533 (4th Cir. March 17, 1989) (UP); *Childers*, 1989 WL 83163.

of limitations. In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983), the Supreme Court held that the applicable statute of limitations in breach of collective bargaining suits against an employer is governed by the six month limitations period for making charges of unfair labor practices to the NLRB pursuant to § 10b of the NLRA. Defendant argues that the plaintiffs are bound by the accrual date of July 19, 1985, which is alleged in the complaint to be the date that defendants failed to pay the benefits claimed therein. Inasmuch as the complaint was not filed until June 1, 1986, defendants argue that the action is barred.

Plaintiffs rely entirely on the jurisdictional nature of the issue before the Court and have not presented the Court with any arguments which would dispute the untimeliness of the complaint if it were proceeding under § 301 of the LMRA. Inasmuch as plaintiffs have not presented the Court with any equitable estoppel argument or countered the accrual date advanced by the defendants, it is

ORDERED that defendants' motion to dismiss be, and hereby is, GRANTED. The Clerk of Court is directed to send an authenticated copy of this Order to counsel of record and to remove this action from the docket of the Court.

ENTER: August 25th, 1989.

/s/ Robert [Illegible]
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

Case Number: 87-75-C

REUBEN J. BARTON, *et al.*,
Plaintiffs,

v.

THE CREASEY COMPANY OF CLARKSBURG,
a West Virginia Corp., and FOX GROCERY CO.,
a West Virginia Corp.,
Defendants.

JUDGMENT IN A CIVIL CASE

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiffs' Motion for Remand is denied. Defendants' Motion to Dismiss is Granted. Clerk is to remove this action from the docket of the Court.

Date August 25, 1989

DR. WALLY EDGELL

/s/ Linda Pukins
(By) Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2170

REUBEN J. BARTON; WILLIAM BEE; CARL D. CAIN; JAMES E. DAVIS; ULYSSES G. DEAN; CHARLES E. EVERETT; JOHN A. FLANAGAN; FRANK FOMINKO; MICHAEL L. FRAZIER; ROBERT H. FRAZIER; WOODY D. HAMRICK; CHARLES E. KNICELEY; MARK E. LABENNE; CHARLES G. LAFFERTY; MARK LANGBEIN; JAMES E. LANTZ; KENNETH L. MATHENEY; WILLIAM L. MAY; FREDERICK MCCARTNEY; HOWARD B. MITCHELL; JAMES E. NUTTER; MICHAEL A. NUTTER; JAMES R. PATTON; ISAAC S. PAUGH; STEPHEN B. RIEL; WILLIAM RINEHART; GLENN SHAW, JR.; LOWELL STOUT; DENNIS C. STUTLER; JOHN F. SWENSKIE; RONALD J. WEBB; LAWRENCE D. WILCOX,

Plaintiffs-Appellants,

v.

THE CREASEY COMPANY OF CLARKSBURG, a West Virginia corporation; FOX GROCERY COMPANY, a West Virginia corporation,

Defendants-Appellees.

On Petition for Rehearing with
Suggestion for Rehearing In Banc

[Filed Apr. 11, 1990]

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Sprouse and Judge Wilkins.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX D

STATUTORY PROVISIONS INVOLVED

West Virginia Code, Volume 8 (1989 Replacement Volume):

§ 21-5-1. Definitions.

As used in this article:

(a) The term "firm" includes any partnership, association, joint-stock company, trust, division of a corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, or officer thereof, employing any person.

(b) The term "employee" or "employees" includes any person suffered or permitted to work by a person, firm or corporation.

(c) The term "wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in sections four [§§ 21-5-4, 21-5-5, 21-5-8a, 21-5-10 and 21-5-12], five, eight-a, ten and twelve of this article, the term "wages" shall also include then accrued fringe benefits capable of calculation and payable directly to an employee; Provided, That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article.

(d) The term "commissioner" means commissioner of labor or his designated representative.

(e) The term "railroad company" includes any firm or corporation engaged primarily in the business of transportation by rail.

(f) The term "special agreement" means an arrangement filed with and approved by the commissioner whereby a person, firm or corporation is permitted upon a compelling showing of good cause to establish regular paydays less frequently than once in every two weeks: Provided, That in no event shall the employee be paid in full less frequently than once each calendar month on a regularly established schedule.

(g) The term "deductions" includes amounts required by law to be withheld, and amounts authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance.

(h) The term "officer" shall include officers or agents in the management of a corporation or firm, who knowingly permit the corporation or firm to violate the provisions of this article.

(i) The term "wages due" shall include at least all wages earned up to and including the fifth day immediately preceding the regular payday.

(j) The term "construction" means the furnishing of work in the fulfillment of a contract for the construction, alteration, decoration, painting or improvement of a new or existing building, structure, roadway or pipeline, or any part thereof, or for the alteration, improvement or development of real property: Provided, That construction performed for the owner or lessee of a single family dwelling or a family farming enterprise is excluded.

(k) The term "minerals" means clay, coal flagstone, gravel, limestone, manganese, sand, sandstone, shale, iron ore and any other metallurgical ore.

(l) The term "fringe benefits" means any benefit provided an employee or group of employees by an

employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits and benefits relating to medical and pension coverage.

(m) The term "employer" means any person, firm or corporation employing any employee.

(n) The term "doing business in this state" means having employees actively engaged in the intended principal activity of the person, firm or corporation in West Virginia. (1917, c. 50, § 1; Code 1923, c. 54, § 71n; 1975, c. 147; 1981, c. 212; 1987, c. 73.)

§ 21-5-3. Payment of wages by employers other than railroads; assignments of wages.

Every person, firm or corporation doing business in this State, except railroad companies as provided in section one [§ 21-5-1] of this article, shall settle with its employees at least once in every two weeks, unless otherwise provided by special agreement, and pay them the wages due, less authorized deductions and authorized wage assignments, for their work or services in lawful money of the United States, or by the cash order as described and required in the next succeeding section [§ 21-5-4] of this article or by any method of depositing immediately available funds in an employee's demand or time account in a bank, credit union or savings and loan institution that may be agreed upon in writing between the employee and such person, firm or corporation, which agreement shall specifically identify the employee, the financial institution, the type of account and the account number: Provided, that nothing herein contained shall be construed in a manner to require any person, firm or corporation to pay employees by depositing funds in a financial institution: Provided further, that if, at any time of payment, any em-

ployee shall be absent from his regular place of labor and shall not receive his wages through a duly authorized representative, he shall be entitled to such payment at any time thereafter upon demand upon the proper paymaster at the place where such wages are usually paid and where the next pay is due.

Nothing herein contained shall affect the right of an employee to assign part of his claim against his employer except as hereinafter provided.

No assignment of or order for future wages shall be valid for a period exceeding one year from the date of such assignment or order. Such assignment or order shall be acknowledged by the party making the same before a notary public or other officer authorized to take acknowledgments, and such order or assignment shall specify thereon the total amount due and collectible by virtue of the same and three fourths of the periodical earnings or wages of the assignor shall at all times be exempt from such assignment or order and no assignment or order shall be valid which does not so state upon its face: Provided further, that no such order or assignment shall be valid unless the written acceptance of the employer of the assignor to the making thereof, is endorsed thereon: Provided further, that nothing herein contained shall be construed as affecting the right of employer and employees to agree between themselves as to deductions to be made from the payroll of employees; And provided further, that nothing herein contained shall be construed as affecting the right of teachers who have elected to become members of a county teachers' retirement system, as permitted by section two [§ 36 7A-2], article seven A, chapter thirty-six, acts of the legislature of West Virginia, regular session, one thousand nine hundred forty-one, to make assignments

of or orders for future wages to such systems for periods coextensive with the term of their contracts of employment. (1887, c. 63, §§ 1, 2; Code 1923, c. 1511, §§ 75, 76; 1937, c. 13; 1943, c. 7; 1979, c. 119.)

§ 21-5-4. Cash orders; employees separated from payroll before paydays.

(a) In lieu of lawful money of the United States, any person, firm or corporation may compensate employees for services by cash order which may include checks or money orders on banks convenient to the place of employment where suitable arrangements have been made for the cashing of such check by employees for the full amount of wages.

(b) Whenever a person, firm or corporation discharges an employee, such person, firm or corporation shall pay the employee's wages in full within seventy-two hours.

(c) Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period's notice of intention to quit the person, firm or corporation shall pay all wages earned by the employee at the time of quitting.

(d) When work of any employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the person, firm, or corporation shall pay in full to such employees not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.

(e) If a person, firm or corporation fails to pay an employee wages as required under this section,

such person, firm or corporation shall, in addition to the amount due, be liable to the employee for liquidated damages in the amount of wages at his regular rate for each day the employer is in default, until he is paid in full, without rendering any service therefor: Provided, however, that he shall cease to draw such wages thirty days after such default. Every employee shall have such lien and all other rights and remedies for the protection and enforcement of such salary or wages, as he would have been entitled to had he rendered service therefor in the manner as last employed; except that, for the purpose of such liquidated damages, such failures shall not be deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition. (1891, c. 76, § 1; Code 1923, c. 15H, § 80; 1925, c. 37; 1975, c. 147.)

§ 21-5-6. Refusal to pay wages or redeem orders.

If any person, firm or corporation shall refuse for the period of five days to settle with and pay any of its employees at the intervals of time as provided in section three [§ 21-5-3] of this article, or to provide fringe benefits after the same are due, or shall neglect or refuse to redeem any cash orders provided for in this article, within the time specified, if presented, and suit be brought for the amount overdue and unpaid, judgment for the amount of such claim proven to be due and unpaid, with legal interest thereon until paid, shall be rendered in favor of the plaintiff in such action; and, if the employee continues to hold the cash order herein provided for, given for payment of labor, in case of the insolvency of the person, firm or corporation giving same, such employee shall not lose his lien and preference under existing laws. (1887, c. 63, § 5; Code 1923, c. 15H, § 79; 1981, c. 212.)

§ 21-5-10. Provisions of law may not be waived by agreement.

Except as provided in section thirteen [§ 21-5-13], no provision of this article may in any way be contravened or set aside by private agreement, and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim and any release required as a condition of such payment shall be null and void. (1975, c. 147.)

§ 21-5-12. Employees' remedies.

(a) Any person whose wages have not been paid in accord with this article, or the commissioner or his designed representative, upon the request of such person, may bring any legal action necessary to collect a claim under this article. With the consent of the employee, the commissioner shall have the power to settle and adjust any claim to the same extent as might the employee.

(b) The court in any action brought under this article may, in the event that any judgment is awarded to the plaintiff or plaintiffs, assess costs of the action, including reasonable attorney fees against the defendant. Such attorney fees in the case of actions brought under this section by the commissioner shall be remitted by the commissioner to the treasurer of the State. The commissioner shall not be required to pay the filing fee or other costs or fees of any nature or to file bond or other security of any nature in connection with such action or with proceedings supplementary thereto, or as a condition precedent to the availability to the commissioner of any process in aid of such action or proceedings. The commissioner shall have power to join various claimants in one claim or lien, and in case of suit to join them in one case of action. (1975, c. 147.)

No. 90-75

In The

Supreme Court of the United States

October Term, 1990

REUBEN J. BARTON; WILLIAM BEE; CARL D. CAIN; JAMES E. DAVIS; ULYSSES G. DEAN; CHARLES E. EVERETT; JOHN A. FLANAGAN; FRANK FOMINKO; MICHAEL L. FRAZIER; ROBERT H. FRAZIER; WOODY D. HAMRICK; CHARLES E. KNICELEY; MARK E. LABENNE; CHARLES G. LAFFERTY; MARK LANGBEIN; JAMES E. LANTZ; KENNETH L. MATHENEY; WILLIAM L. MAY; FREDERICK MCCARTNEY; HOWARD B. MITCHELL; JAMES E. NUTTER; MICHAEL A. NUTTER; JAMES R. PATTON; ISAAC S. PAUGH; STEPHEN B. RIEL; WILLIAM RINEHART; GLENN SHAW, JR.; LOWELL STOUT; DENNIS C. STUTLER; JOHN F. SWENSKIE; RONALD J. WEBB; LAWRENCE D. WILCOX,

Petitioners,

v.

THE CREASEY COMPANY OF CLARKSBURG, a West Virginia corporation, and FOX GROCERY CO., a West Virginia corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE PLAINTIFFS' CAUSE OF ACTION, WHICH ARISES EXCLUSIVELY FROM A COLLECTIVE BARGAINING AGREEMENT CAN BE BROUGHT UNDER STATE LAW OR IS PREEMPTED BY SECTION 301 OF THE NATIONAL LABOR RELATIONS ACT.

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CASES

SUMMARY OF ARGUMENT

a. Petitioners' cause of action below is preempted by Section 301 of the National Labor Relations Act, as clearly, or at least "arguably" arising out of a union contract;

b. Actions under Section 301 of the National Labor Relations Act are subject to the six month statute of limitations set forth in Section 10(b) of said Act;

c. The action herein was not filed within six months of the events complained of and allegedly giving rise to the cause of action;

d. The order and opinion of the Fourth Circuit Court of Appeals is consistent with Federal Law and with the decisions of this Honorable Court.

REASON FOR DENYING THE WRIT

As found by the Court of Appeals, the Respondents had a contract with the Teamsters union providing for, among other things, vacation pay for certain of its employees. Respondent's interpretation of this contract permitted it not to pay vacation pay to temporary or part time employees. Petitioners were terminated under the terms of that union contract following an economic cut back in the work force. They were not paid vacation pay at the time of their termination.

Petitioners' complaint alleges that Respondents did not pay their accumulated vacation pay "as provided by the parties collective bargaining agreement . . . ", and further, that other parties of the same union contract,

" . . . created an implied contract to pay all employees severance pay . . . . " (See Paragraph II of the Court of Appeals Decision.)

Respondents, in its removal from state court and its argument before the Fourth Circuit, claimed federal preemption under Section 301 of the National Labor Relations Act. Section 301 provides that a suit for breach of a union contract can be brought in the federal courts. Thereupon, based on another provision of the National Labor Relations Act, Section 10(b), Respondents were successful in having the complaint dismissed. Section 10(b) provides a six month statute of limitations for filing a suit for breach of a union contract. The action herein was not filed within six months of the events complained of.

This court has held that if a case arises under a union contract, or "arguably" arises under a union contract, it is preempted by Federal law. This court noted in *Avco Corporation v. Machinist Union*, 390 U.S. 597 (1968), " . . . when the heart of the complaint is a clause in the collective bargaining agreement that complaint arises under Federal law . . . the preemptive force of Section 301 is so powerful as to displace entirely a state cause of action for violation of collective bargaining contracts." This court further held in *Franchise Tax Board v. Construction Laborers*, 463 U.S. 1 (1983), that " . . . any such suit is purely a creature of federal law notwithstanding to the fact that state law would provide a cause of action in the absence of Section 301 . . . . "

Petitioners' complaint does not allege, nor does their counsel attempt to prove, that a claim for vacation benefits arise anywhere except out of the union contract. The claim for severance pay by Petitioners' complaint arises only out of their assertion that the offer of severance was made to certain management officials and therefore should be made to Petitioners. (See Paragraph I of Court of Appeals' Decision.) However, there is an additional clause in the union contract which prohibits such a claim. This contract language provides, "The company retains all rights, powers, and authority exercised and had by it prior to the time the union became recognized . . . , except as specifically limited by express provisions, of this agreement." Thus, the claim for additional benefits is barred by the union contract. If somehow an argument could be made that it is not barred then the above cited language would have to be interpreted. Surely the claim is at least "arguably" prohibited by this language. This court recently faced this issue in *United Steelworkers v. Rawson*, ___ U.S. ___, 134 LRRM 2153 (May 14, 1990), and noted that the preemptive force of Section 301 extends beyond state law contract actions if the matter claimed is created by a collective bargaining agreement and does not exist without such agreement. This court again noted that if the basis of the suit cannot stand without the labor agreement it is preempted. See in this regard also *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 118 LRRM 3345, (1985); *Electrical Workers (IBEW) v. Hechler*, 481 U.S. 851, 125 LRRM 2353 (1987). All of the facts in this case found by the Court of Appeals, and in Petitioners' complaint point to the inescapable conclusion that their claims arise

totally from rights or benefits allegedly given Petitioners in the labor contract.

CONCLUSION

The claims of Petitioners arise under the union contract. Without the union contract they would have no claim. Petitioners cite no West Virginia statute or case giving them a right to vacation pay or severance pay. There is no such right in state law. The right to both or either is a creature of the union contract. Even Petitioners plead in their complaint that their rights, herein asserted, arise out of the union contract. Therefore the matter is preempted by Section 301 of the Federal Labor Law, including the six month statute of limitations, the suit was not filed within six months. The complaint was properly dismissed. This court should therefore deny Petitioners' claim for a Writ of Certiorari.

Respectfully submitted,

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